

CASE NO. 08cv 1589

ATTACHMENT NO. 7

EXHIBIT \_\_\_\_\_

TAB (DESCRIPTION) \_\_\_\_\_

STATE OF ILLINOIS }  
COUNTY OF COOK } ss

I, AURELIA PUCINSKI, Clerk of the Circuit Court of Cook County, in said County and State, and Keeper of the Records and Seal thereof, do hereby certify the above and foregoing to be a true, perfect and complete copy of .....  
VOLUME FIVE OF A FIVE VOLUME  
SUPPLEMENTAL RECORD CONSISTING OF THE ( REPORT OF PROCEEDINGS) ONLY. NO PRAECIPE  
HAVING BEEN FILED PURSUANT TO THE NOTICE OF APPEAL FILED IN THE APPELLATE COURT  
UNDER APPELLATE COURT NO. 95-0474

in a certain cause ..... LATELY ..... pending in said Court, between  
The People of the State of Illinois. .... WERE ..... Plaintiffs and  
JEROME HENDRICKS ..... WAS ..... Defendant. ...

Witness: AURELIA PUCINSKI,

Clerk of the court, and the Seal thereof, at Chicago

JUNE 26, 96

In said County, ....., 19 .....



*Aurelia Pucinski*  
Clerk

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

95-

Transcript of Record  
Appeal  
to

88CR

12517

APPELLATE

Court of Illinois  
District

FIRST

SUPPLEMENTAL RECORD

Circuit Court No. 88 CR 12517

Trial Judge LEO H. HOLT

Reviewing Court No. 95-0474

THE PEOPLE OF THE STATE OF ILLINOIS

FILED  
APP

VS.

JEROME HENDRICKS

JUL 15 1996

GILBERT S. MARCHEMAN  
CLERK

ORDER ENTERED

JAN 17 2007

APPELLATE COURT, FIRST DISTRICT

from  
CIRCUIT COURT  
of

COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, CRIMINAL DIVISION

ORDER ENTERED  
JAN 17 2007  
APPELLATE COURT, FIRST DISTRICT

88-12517

AURELIA PUCINSKI

Clerk of Court

Per AP/nd

Deputy

Sup 200

UNITED STATES OF AMERICA

State of Illinois )  
Cook County ) ss.

Pleas, before a branch of the Circuit Court of Cook County, in said County and  
State, begun and held at the Circuit Court, in said County,  
one thousand nine hundred and NINETY SIX AND OF THE INDEPENDENCE  
OF THE UNITED STATES OF AMERICA, TWO HUNDRED AND NINETEENTH YEAR.

Present: Honorable

THOMAS R. FITZGERALD..... Judge of the Circuit Court of Cook County

JACK M. O'MALLEY..... State's Attorney

MICHAEL F. SHEAHAN..... Sheriff of Cook County

AURELIA PUCINSKI..... Clerk

Attest:

And afterwards, to-wit: on

JUNE 25 , 19 96 , there was RECEIVED and FILED

in the Office of the Clerk of the Clerk of the Circuit Court of Cook County, Illinois. COUNTY DEPARTMENT,  
CRIMINAL DIVISION, A (\$IX) VOLUME SUPPLEMENTAL RECORD CONSISTING OF (REPORT OF PROCEEDINGS)  
ONLY. AN INFORMATION GEN. NO. FOLLOWING TO WIT:

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AURELIA H. ...  
CLERK OF THE CIRCUIT COURT  
CRIMINAL DIVISION

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STATE OF ILLINOIS )  
COUNTY OF C O O K )

IN THE CIRCUIT COURT OF COOK COUNTY  
COUNTY DEPARTMENT-CRIMINAL DIVISION

THE PEOPLE OF THE )  
STATE OF ILLINOIS ) NO. 88 CR 12517  
VERSUS )  
JEROME HENDRICKS and ) CHARGE: Murder  
JULIUS CLAYBORN )

REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 29th day of  
March A.D. 1989, this cause came on for  
hearing before the Honorable Leo E. Holt,  
Judge of said Court.

APPEARANCES:

HON. RICHARD M. DALEY,  
State's Attorney of Cook County, by  
MR. CHARLES BOSKEY,  
Assistant State's Attorney,  
appeared for the People;  
  
MS. SHELBY KEISMAN and  
MR. ISIAH GANT,  
Assistant Public Defenders,  
appeared for the Defendant.

BEVERLY HOOKER, C.S.R.,  
Official Court Reporter

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PENGAD CO., BAYONNE, N.J. 07002 FORM IL 24A

1 THE CLERK: Julius Clayborn and sheet four,  
2 line one, Jerome Hendricks, in custody.

3 MR. GANT: If the Court please, before you  
4 stand Jerome Hendricks. I am Isiah Gant. Mr.  
5 Hendricks is represented by Randolph Stone, the  
6 Public Defender of Cook County. I am here as an  
7 Assistant Public Defender on his behalf.

8 MS. KEISMAN: This is Julius Clayborn to my  
9 immediate right. He is represented by myself,  
10 Shelby Keisman, Assistant Public Defender, and  
11 Michael Morrissey, Assistant Public Defender.

12 THE COURT: Because there are motions in some  
13 respects identical and in some respects very, very  
14 similar in both of these cases, I have made the  
15 decision to consolidate for the purposes of  
16 argument and ruling on these pretrial motions.  
17 Does anyone have any objection?

18 MS. KEISMAN: No.

19 MR. BOSKEY: No.

20 MR. GANT: I do not. However, when I filed  
21 these motions, there's one that didn't get in the  
22 file, which is similar to one Ms. Keisman has  
23 filed. It's a motion to declare the death penalty  
24 unconstitutional.

1 MR. BOSKEY: Mr. Gant showed it to me. I  
2 have no objection to it being filed today.

3 THE COURT: What I suggest we do, because it  
4 seems to me that the motion to compel disclosure,  
5 which both sides have filed and raised basically  
6 the same arguments, is to extent controlling on  
7 some of the other motions that have been filed,  
8 and so I would like to hear your arguments on that  
9 one, because it will save us some time, depending  
10 on how I rule on that.

11 The Defendants and Counsel may all be  
12 seated at Counsel's table, and I would hear both  
13 the Defense's and the State's argument on that  
14 motion, as it applies to both Defendants.

15 MS. KEISMAN: On December 14th I filed a  
16 motion to compel the prosecution to disclose, and  
17 also a motion to preclude the special procedures  
18 necessary for capital sentencing. That was  
19 attached with a memorandum, that was filed on  
20 December 14th of 1988.

21 On March 13th of 1989 I filed four  
22 motions with the Court. These four motions  
23 supercede the motion that was filed on December  
24 14th of 1988. It somewhat incorporates that

1 motion and makes a few changes. You can disregard  
2 the motion filed on December 14th and consider the  
3 four motions that were filed on the 13th.

4 THE COURT: You will have to tell me the  
5 title of the motions.

6 MS. KEISMAN: The motion that was filed  
7 December 14th, I will show you a copy. It's  
8 probably got the longest title. It's motion to  
9 compel the prosecution to disclose whether it  
10 will request a death penalty hearing if the  
11 Defendant is convicted of murder, and motion to  
12 preclude the special procedures necessary for  
13 capital sentencing.

14 THE COURT: So that one, we will -- he is  
15 merged into the others that are filed, is that  
16 correct?

17 MS. KEISMAN: Yes, Judge. I shortened  
18 the title and hopefully made it more clear.

19 THE COURT: Did you also file a motion to --  
20 you filed a motion to compel the disclosure.

21 MR. GANT: Yes.

22 THE COURT: The Defendants may be seated, and  
23 I will hear your arguments in any order that you  
24 desire to present them to me in terms of who's

1 going to proceed first.

2 Mr. Gant, these are Defense motions.  
3 You may proceed, or however you want to do it.

4 MR. GANT: If the Court please, I would defer  
5 to Ms. Keisman for the similar motion.

6 MS. KEISMAN: Judge, I am going to address  
7 the motion, compel the prosecution as that first  
8 motion. I will be brief on this on what I have to  
9 say because I think there's some overlapping  
10 issues regarding all the motions. But I guess the  
11 most important thing I could say at this point is  
12 -- would be that the other issues need not be  
13 addressed if Your Honor grants the motion to  
14 compel the prosecution, and they say no, we are  
15 not seeking the death penalty.

16 I don't think I have to emphasize the  
17 importance of defending a capital case. There's a  
18 lot that needs to be done. There is a lot of  
19 work. And there's also a lot of motion. A lot of  
20 things will be necessary to protect Mr. Clayborn's  
21 rights.

22 In terms of fairness, Mr. Clayborn needs  
23 to know if he is facing a potential capital  
24 sentence in this case. In terms of notice, Mr.

1 Clayborn is entitled to know whether he's facing  
2 a potential capital case sentence in this case.  
3 In terms of preparation, in terms of what goes on  
4 in this courtroom, I think the Court is entitled  
5 to know whether this is going to be a case that  
6 will be conducted with the special procedures  
7 that are necessary for a capital case. Are we  
8 going to have a jury? Is the jury going to be  
9 Witherspoon? Things like that. There are  
10 motions, maybe close to, up to a dozen motions, I  
11 will be prepared to file if this were a capital  
12 case. I would not want to take up everybody's  
13 time doing those motions if there is clearly no  
14 intention to seek the death penalty in this case.

15 My written motion really does speak for  
16 itself. There's a lot of things I would like to  
17 do for Mr. Clayborn that won't be necessary if  
18 this is not going to be a capital case, Judge. I  
19 don't see the unfairness or the inequity in saying  
20 to the State, Mr. State's Attorney, do you intend  
21 to seek the death penalty in this case. I don't  
22 see that that puts them in any disadvantage. I  
23 don't see that makes them force their hands for  
24 something they shouldn't have to. I don't see the

1 inequity in it.

2 All the factors seem to point to the  
3 bottom line that we should all know what this case  
4 is about at the earliest possible moment. For  
5 that reason, Judge, we are asking now to know  
6 whether we need to go on any further, or whether  
7 we may proceed as we would in any other case.  
8 Thank you.

9 THE COURT: Mr. Boskey.

10 MR. BOSKEY: Judge, a brief response. I  
11 believe we addressed this issue once before on  
12 another case before Your Honor. My understanding  
13 of various Supreme Court decisions that have  
14 scrutinized death penalty statutes continuously  
15 for several years, one of the later cases, People  
16 vs. Gaines, 109 Illinois 2nd page 514, again  
17 addressed the issue on whether or not the  
18 Defendant or defense is entitled to pretrial  
19 notice, whether or not the State will seek the  
20 death penalty. Again the Supreme Court indicated  
21 that there was no constitutional requirement that  
22 the Defendant have pretrial notice that the State  
23 would seek the death penalty if there should be a  
24 finding of guilty of murder. That again would be

1 the State's argument, that they are not entitled  
2 to that pretrial notice. The only notice they  
3 are required to have is that the case is before  
4 Your Honor that encompasses both Mr. Hendricks and  
5 Clayborn as they sit here today, they are  
6 potentially death penalty statute, they are  
7 potential death penalty cases. They are on notice  
8 that they are potentially death penalty cases.  
9 And I don't believe constitutionally they have to  
10 receive anymore information than that.

11 It would be our argument that they are on  
12 notice that they are potential death penalty cases  
13 and constitutionally I don't believe we are  
14 required to give any further information at this  
15 point. I would rest at that. And rest on all the  
16 various Supreme Court cases that I know Your Honor  
17 is aware of.

18 THE COURT: Response?

19 MS. KEISMAN: I would defer to Mr. Gant at  
20 this time.

21 MR. GANT: Your Honor, I think that all of us  
22 who engage in defending capital cases are well  
23 aware there is in fact lesions of case law that  
24 say the State is not obligated to notify us, being



1 the Defense, whether or not they intend to seek  
2 the death penalty.

3 But there is however the small provision  
4 in the Constitution of the United States, as well  
5 as the Constitution of the State of Illinois, that  
6 talks about due process. And I think it was Felix  
7 Frankford who said that due process is all about  
8 what is fair. The appearance of being fair. And  
9 I suggest to Your Honor due process would be  
10 served well if you were to enter an order  
11 directing the State to say now, to say whether  
12 or not they are going to seek the death penalty  
13 sentencing phase should the Defendants in these  
14 two cases be convicted. I'm talking about  
15 fairness. The State is not prejudice in any  
16 manner by telling us right now whether or not  
17 they intend to do it.

18 And there's at least one good reason  
19 other than judicial economy for them having to do  
20 this. It's not uncommon, Judge, in terms of  
21 preparation that a lawyer has to go through in a  
22 death penalty case that in your preparation for a  
23 possible sentencing phase, your theory in that  
24 portion of the bifurcated trial might well be

1 different or inconsistent than the Defense you  
2 have taken in terms of guilt and innocence. If  
3 you know from the very beginning there is in fact  
4 a possibility that the State will seek the death  
5 penalty if the Defendant is convicted, at least in  
6 terms of preparation on behalf of the Defense,  
7 you can certainly avoid that charge that we so  
8 often get about being ineffective, if you know up  
9 front that there is the possibility of death or  
10 death hearing. You can then prepare you case  
11 consistent with the dictates, I suggest to you, of  
12 the Canons of Ethics, Judge. We can then sit  
13 down and prepare a Defense of knowing this is the  
14 way we must go, because if there is a finding of  
15 guilty, there will be a death hearing.

16 I suggest the State is not hurt if they  
17 tell us now, in no way. For that reason, Judge,  
18 due process reason, they ought to be directed.

19 MR. BOSKEY: May I clarify one thing? As  
20 I sit here today, I don't have the authority --  
21 and just to differ with Counsel -- whether or not  
22 I will seek the death penalty on either of  
23 these people. I cannot say I have the authority  
24 to say that as I sit here today.

1 THE COURT: Well, Mr. Boskey, I don't think  
2 the decision that I am called upon to make in any  
3 respect returns upon your individual  
4 understanding of the course of this case. We are  
5 talking about the State's Attorney of Cook County  
6 and -- or even better than that perhaps the  
7 administration of criminal justice systems in  
8 Illinois, which has nothing to do with you  
9 personally. I understand full well that you  
10 might not be personally in a position to make any  
11 decisions in regard to the ultimate procedures  
12 that this case will take. I fully understand  
13 that.

14 This case -- this motion bothers me. It  
15 bothers me considerably. It bothers me for a lot  
16 of reasons. And I suspect really the more  
17 significant reason is because I believe that it is  
18 fundamentally unfair from a constitutional point  
19 of view not to tell the Defendant what the name of  
20 the game is.

21 And I'm fully aware that the Illinois  
22 Supreme Court, in a 4 to 3 decision, has held that  
23 the Illinois death penalty statute in face of  
24 the argument that's being made to me is

1 constitutionally valid. I'm also aware that in  
2 the change of the Court personnel, where the  
3 personnel of the Court then was four Justices  
4 who believed these statutes to be unconstitutional,  
5 nonetheless, would not review the earlier  
6 decisions in that regard, because of the  
7 doctrine of stare decisis. And I must tell you  
8 that I don't quite understand that. The highest  
9 Court in the State, or the highest Court in the land,  
10 judiciously reviews its own decisions to correct  
11 itself and to correct a mistake in the law.  
12 Illinois has chosen -- and I'm not in a position  
13 to do more than express my observations about what  
14 the Illinois Supreme Court has done -- but  
15 nonetheless they have chosen not to review this  
16 statute which I believe is unconstitutional.  
17 That's not a belief that's unique to me. Justice  
18 Ryan in his dissent in *People ex rel Carey vs.*  
19 *Cousins*, announced that in his opinion, the failure  
20 to give the Defendant any notice at all rendered  
21 the statute unconstitutional.

22 And Justice Simon in *People vs. Lewis*,  
23 adopted the thinking of Justice Ryan. And he  
24 also was of the opinion that provision rendered the

1 statute unconstitutional. So you have four  
2 Justices of the Illinois Supreme Court who believe  
3 the statute is unconstitutional, but nobody will  
4 of yet do anything about it. It's a frightening, to  
5 me frightening, that a person might be put to  
6 death under this statute which the majority of the  
7 Supreme Court believes to be unconstitutional.

8 Every lawyer, Defense lawyer or  
9 prosecutor that I have had occasion to speak to  
10 that has been involved in a capital case knows  
11 very clearly and very certainly that a capital  
12 case is very different with every respect than any  
13 other case. Its impact upon the system, the  
14 lawyers who are involved with it, the jurors who  
15 must hear it, the Defendant and his family, the  
16 victims of the alleged crime and family, everybody  
17 is tremendously impacted by this critical decision  
18 in more ways than I can probably enunciate. Insofar  
19 as the Defendant is concerned, the impact is  
20 immediate. It determines and weighs upon every  
21 single decision that he or she must make in the  
22 preparation of the case for trial and the trial of  
23 the case, and everything else. And the decisions  
24 that are made as a pretrial matter, if they are

1 made in a vacuum, tend to be wasteful, time  
2 consuming, unnecessary, and extremely costly.  
3 Which is why for the most part the death penalty  
4 cases in Cook County, to my personal observation  
5 at least, and I'm safe in saying that I'm right,  
6 for the most part most capital cases are tried by  
7 governmental lawyers. Or lawyers who have been  
8 appointed by the Court. Because those Defendant's  
9 are economically incapable of retaining a lawyer  
10 to represent them in a capital case. Even though  
11 there might be lawyer who will take the case  
12 absent a capital sentencing possibility. So the  
13 very right of a Defendant to Counsel of his choice  
14 becomes involved immediately when there's a  
15 capital possibility.

16 And it never stops. It never ceases  
17 until the last day, the last sentence is uttered  
18 in open court on the trial court level for that  
19 Defendant.

20 All of those decisions flow from the  
21 decision to convert a murder into a capital  
22 murder. And it is inconceivable to me that the  
23 laws will keep the Defendant in the dark about  
24 that until it's too late for him to meaningfully

1 protect himself. It boggles my mind. But, that's  
2 what I understand the law is.

3 Now, the question of whether or not  
4 based upon due process grounds I can overrule  
5 in effect the Illinois Supreme Court is doubtful.  
6 While due process is exactly what Mr. Gant says it  
7 is in some senses, the fundamental fairness and  
8 the appearance of fundamental fairness, yet it is  
9 not out there in a vacuum. And I can't use that  
10 concept to simply disregard the clear holdings in  
11 cases which have been decided by the Supreme Court  
12 of Illinois. I am bound by that, by those  
13 decisions whether I agree with them or not. And I  
14 don't agree with them in any respect insofar as  
15 keeping the Defendant in the dark.

16 And, it is not true, respectfully, Mr.  
17 Boskey, that a Defendant can look at the indictment  
18 and/or the statute or indeed at the facts of the  
19 case and determine prior to trial whether or not  
20 he has in fact a capital case. He may be able to  
21 look at the statute and the indictment and his  
22 understanding of the facts that there is the  
23 potential for it to become a capital case, but he  
24 never knows what the real name of the game is

1 until it is much too late for him to meaningfully  
2 protect himself. And with that problem, of  
3 course, whatever he fails to do in the trial court  
4 level by pretrial motions may constitute a  
5 waiver on appeal.

6 And so he's trapped in between a rock  
7 and a hard place of having to go forward with a  
8 multiplicity of motions that are totally moot if in  
9 fact the case is not going to be tried as a  
10 capital case.

11 In order to ensure that he has a perfect  
12 record if in fact a death sentence needs to be  
13 reviewed.

14 It is fundamentally unfair, it seems to  
15 me, to Witherspoon a jury that may not be called  
16 upon to decide the issue of life or death. And  
17 I'm fully aware that the United States Supreme  
18 Court has held that Witherspooning does not create  
19 an unconstitutional conviction prone or death  
20 prone jury. I'm aware that the Supreme Court has  
21 said that. They have said that in the face of all  
22 the psychological studies that come to the  
23 opposite conclusion. And in the face of no study  
24 that I'm aware of that comes to the conclusion



1 that Witherspoon does not produce a conviction  
2 prone or death prone jury. All the studies say it  
3 does. And yet the Supreme Court has said that  
4 even if it does, it is not reached the level of  
5 constitutional impermissability.

6 But, it seems to me that those of us who  
7 have labored in the trial court with that  
8 problem know full well that that's a fiction that  
9 we utilize in the law and that the realities are  
10 that you produce a jury that is askew insofar as  
11 opinions in regard to capital punishment as they  
12 exist in the larger community. So it seems to me  
13 that of course if we knew that it was not going  
14 to be a death case, we would not permit the  
15 Witherspooning of the jury. And there's nothing  
16 after the jury has been Witherspooned and a  
17 conviction had for the State to say we are not  
18 going to at this time seek a death penalty  
19 hearing. And then to say that the Defendant has  
20 not in any way been disadvantaged, I think is to  
21 close our eyes to the reality in deference to  
22 form.

23 Now, having said all that, I say it  
24 because if this case requires review at least the

1 Supreme Court will know what one less surprise  
2 judge has thought about this for whatever it is  
3 worth. I think the statute is unconstitutional.  
4 I think it is unfair. I think it offends my  
5 constitutional sense of due process. It offends  
6 my concept of just basic fairness as what is  
7 right in terms of relationships that we have with  
8 fellow human beings. Not to let them know what  
9 the name of the game is.

10 As early on as possible so that he can  
11 really have the effective assistance of Counsel.  
12 And Counsel cannot, it seems to me, be effective  
13 unless they know the name of the game. And one  
14 half of the participants at least is in a position  
15 to know from the outset what the probabilities are  
16 going to be. While the Defendant must guess all  
17 the way. And given the number of potential  
18 Defendants who have been found guilty in Cook County  
19 without the invocation of a death penalty hearing,  
20 it is facetious to suggest that the Defendant  
21 read the statute in indictment and he or she can  
22 determine ahead of time whether or not they have a  
23 capital case on their hands. That just simply is  
24 not the case. And they are entitled to more

1 notice, it seems to me, than that.

2 But as I say, faced with Carey versus  
3 Cousins and faced with People versus Lewis and  
4 faced with People versus Gaines, I am not certain  
5 that there's anything that I can do.

6 I took a look at People versus Buckley.  
7 I believe it is out of DuPage County. To see  
8 whether or not the Court's inherent power to  
9 control the court call gave me any assistance in  
10 ordering the State to make this disclosure. I  
11 concluded that it did not. I conclude that it did  
12 not because if the State declined to disclose, I  
13 don't know what I can do. I could possibly,  
14 preclude a death penalty hearing. And it seems to  
15 me the status of the law now, I would promptly be  
16 reversed. I would think that if I did that, the  
17 State would seek an original mandamus and  
18 undoubtedly would be given leave to file it. My  
19 sense is that the Supreme Court would very shortly  
20 remand it and order me to conduct a death penalty  
21 hearing. So that's a useless procedure.

22 But I'm deeply concerned that I may be  
23 compelled to sit here and listen to motions as  
24 complex as these are. They are complex. At least

1 they are complex to me. And cause me to do some  
2 degree of agonizing and research to try to figure  
3 out some of the issues and the laws that applies  
4 to some of the motions that have been filed before  
5 me, only to find that I have been spinning my  
6 wheels because I don't have a capital case on my  
7 hands.

8 Or the converse is equally devastating  
9 too. If I have a jury in the box that returns a  
10 verdict of guilty and the guilty is of first  
11 degree murder and the State's Attorney then asks  
12 me to invoke the death penalty hearing phase and  
13 Defense says, Judge, we are not ready; we want to  
14 file motions for discovery; we want to investigate  
15 the State's witnesses that will be called to testify  
16 in this hearing; we want to go out and get  
17 witnesses of our own; and there's a whole category  
18 of things that must be done; we have not done them  
19 because we did not know we were in that situation.  
20 That's a reasonable position, it seems to me, for  
21 Defense to take. Unless I'm to say to them, you  
22 should have spent thousands of dollars in  
23 pretrial preparation for hearing that we did not  
24 know we were going to have. So then, I have to do

1 what with the jury, discharge that jury and  
2 impanel another one, or send that jury home for a  
3 month or two or whatever time period it takes to  
4 allow the Defense become prepared for the hearing,  
5 or to compel the defendant to go into a hearing  
6 with his lawyer saying he's not prepared for it.  
7 Which hearing could result in life or death of the  
8 Defendant.

9 All of those things do obviate or  
10 certainly ameliorate to a large extent if we knew  
11 beforehand what the name of the game was. Those  
12 are the things that bother me about this provision  
13 of the statute. But I'm compelled, as reluctant  
14 as I am, I'm compelled however, to deny the motion  
15 of the Defendants to compel the State to disclose  
16 whether or not they intend to seek the death  
17 penalty if the Defendant is found guilty of the  
18 offense of first degree murder.

19 Now, Ms. Keisman, your motion to -- I  
20 think it is to declare the -- Your motion to  
21 preclude the death penalty procedures to which you  
22 have attached the opinion of Menard versus  
23 Cartwright, I would like to hear from you on that  
24 motion.

1           Mr. Gant, I don't believe you filed such  
2 a motion.

3           MR. GANT: I did, Your Honor.

4           THE COURT: You did?

5           MR. GANT: Yes.

6           THE COURT: On the same grounds?

7           MR. GANT: Same grounds, Your Honor. I have  
8 an extra copy, Your Honor.

9           THE COURT: Yours is not predicated on the  
10 same ground, I don't think, but you have filed a  
11 motion to preclude the death penalty procedure,  
12 but it is not based upon the holdings --

13          MR. GANT: I'm sorry. Not specifically, it  
14 is not.

15          THE COURT: I would like to hear from you,  
16 Ms. Keisman, on your motion to preclude.

17          MS. KEISMAN: Judge, I guess initially I  
18 should say it is kind of a strange position to be  
19 in here. We are back where I was nine months ago,  
20 left with not really knowing this is a death case  
21 or not. I'm going to assume it's a death case.

22          THE COURT: I think you have to.

23          MS. KEISMAN: I have to assume it's a death  
24 case. I have a copy of the indictment which

1 charges Mr. Clayborn in two counts. The first  
2 count is the offense of first degree murder, and  
3 it states, he without lawful justification  
4 intentionally and knowingly beat and killed Tamar  
5 Nelson with his hands, a violation of Chapter 38.

6 The second count of the indictment also  
7 states that he is charged with the offense of  
8 first degree murder, in that he without lawful  
9 justification beat and killed Tamar Nelson with  
10 his hands, knowing that such beatings with his  
11 hands created a strong probability of death, or  
12 great bodily harm to Tamar Nelson, in violation  
13 of Chapter 38.

14 The Chapter 38 death penalty section,  
15 section 9-1, contains a variety of phases that  
16 would make any murder a potential capital case,  
17 creating various aggravating factor.

18 There's nothing in the four corners of  
19 these two pages which indicates to me that this is  
20 a death case. There's nothing on these two pages  
21 which says there is an aggravating factor here as  
22 contained in the statute. And we are going to  
23 tell you what that aggravating statute is. We are  
24 going to put you on notice of what that

1     aggravating provision is. It's not in the  
2     indictment. It's a plain murder indictment.

3             So, I get the discovery and I read the  
4     police reports, and I see that the victim in this  
5     case is an infant, 18 months old. And I go to  
6     Chapter 38 and I read over the aggravating  
7     factors, and I see that there is a provision that  
8     says if the victim is under 12 years of age, and  
9     the murder is accompanied by exceptionally brutal  
10    or heinous behavior indicative of wanton cruelty,  
11    this is a potential death case. That is an  
12    aggravating factor.

13            So, I go back to the indictment and I  
14    don't see anything in the indictment. I don't see  
15    that she's under 12 years of age. I don't see  
16    what was brutal, what was heinous. What shows  
17    wanton cruelty. I don't see anything in there.

18            So I say to myself, well, is this a  
19    death case? I don't know. And I look back at  
20    the record and I see that when Mr. Clayborn came  
21    into Court for the first time after his arrest,  
22    he was brought before a Judge for purposes of  
23    setting a bond, and for purposes of having a  
24    preliminary hearing. And the State says, we are



1 not ready for a preliminary hearing. And the  
2 Defense say we are. And the matter is continued  
3 and within the 30 day time period, Mr. Clayborn is  
4 indicted. So there is no preliminary hearing.  
5 There is no opportunity to find out what this  
6 case is about.

7 But there is one thing that I do know.  
8 I know that Mr. Clayborn is given a bond. He's  
9 given a \$500,000 bond. Under that statute the  
10 State is entitled to ask for a no bail order in a  
11 potential capital case. And apparently they did  
12 so here, initially, in Mr. Clayborn's first  
13 appearance. And we, on behalf of Mr. Clayborn,  
14 objected to that request. First of all on grounds  
15 of notice. We need some notice of this request.  
16 And our objection was noted and sustained and the  
17 issue was never litigated. Mr. Clayborn has a  
18 bond. He has a \$500,000 bond, Judge. He has  
19 always had that bond. The State has never asked  
20 for a no bail order.

21 When I look back on this case and I see  
22 that, I say to myself, well, maybe this isn't a  
23 death case. If this was a death case, they should  
24 have asked for the no bail order. They didn't.

1 They should be collaterally estopped now from  
2 coming in and saying this is a death case. What's  
3 been happening for the last nine months? So as we  
4 are here today, I say, well, it seems it's going  
5 to be a death case.

6 So, how am I going to defend Mr.  
7 Clayborn? And I read through the police reports.  
8 And yes, it is clear the victim was under twelve  
9 years of age. But now I'm left to guess what  
10 could possibly constitute exceptionally brutal or  
11 heinous behavior indicative of wanton cruelty.  
12 What is that? I read the police reports. They  
13 are brief. There's maybe twelve, fifteen pages of  
14 police reports. There's some medical reports.  
15 And I look at the indictment. That doesn't tell  
16 me what the factors are.

17 What do I have to defend against? What  
18 actions did Mr. Clayborn specifically take that  
19 were exceptionally brutal or heinous indicative of  
20 wanton cruelty? I don't know, Judge. It's the  
21 same issue as was raised in the motion to compel.  
22 It's due process. It's fundamental fairness. We  
23 must be prepared to defend this case. There's  
24 nothing that puts us on notice on what we are to

1 defend against.

2 I attached the case of Menard versus  
3 Cartwright, found at 486 U.S., no page cite, 100  
4 Lawyers Edition, 2nd 372. That's a 1988 case,  
5 June of 1988 decided by the United States Supreme  
6 Court where they reviewed an aggravating  
7 circumstance provision of Oklahoma death penalty  
8 statute. And the United States Supreme Court felt  
9 that the term, especially heinous, atrocious, or  
10 cruel murders was unconstitutionally vague under  
11 the Eighth Admendment.

12 Without being facetious, Judge, if the  
13 Supreme Court doesn't know what it is, how are we  
14 supposed to know what it is? I think there's some  
15 serious doubt as to whether the State can come in  
16 under this provision, under an indictment like  
17 this, and ask for the death penalty. They have  
18 got the advantage of Witherspoon jury, of a death  
19 qualifying jury, of a conviction prone jury. They  
20 had the advantage or the leverage, I should say,  
21 of preventing us from any thought of a negotiation  
22 in this case because of leverage they have by  
23 being able to say this is a potential death case.

24 I think -- I have also attached the

1 citing which Your Honor referred to regarding the  
2 conviction prone jurors, the death qualification  
3 process. All of that is tied into the indictment  
4 and the lack of notice this indictment gives to  
5 us.

6 Many jurisdictions including California,  
7 and I cited the cases in my memorandum, provide  
8 that the -- Or mandate that the charging  
9 instrument set forth the aggravating factors that  
10 the State is seeking for death. Illinois does not  
11 require that. In those jurisdictions where the  
12 aggravating factors are supposed to be in the  
13 indictment, defense counsel has the opportunity to  
14 come in pretrial and attack the indictment, the  
15 sufficiency of the indictment as in any other  
16 case. The statute sets our reasons to attack a  
17 motion to dismiss an indictment.

18 We can't do it here. We can't do it  
19 here because of the qualifying factors, the  
20 aggravating factors are not in there. I can't  
21 come in and say this is a defective indictment  
22 because it is not in there.

23 I think Your Honor has the authority to  
24 say to the State, you have to tell them, you have

1 to give them notice of what they are to defend  
2 against. I have no notice. I don't know what the  
3 facts are that will support exceptionally brutal  
4 or heinous behavior indicative of wanton cruelty.  
5 How can I defend the case without negligence of  
6 those specific facts, Judge? It's the same issue.  
7 It's fundamental fairness. It's due process.  
8 This goes one step further because now we are  
9 dealing with the piece of paper that supposed to  
10 be the charging instrument. It is supposed to put  
11 the Defendant on notice. We are not. We are  
12 still in the dark.

13 Based upon the case that the United  
14 States Supreme Court has set down, and based on  
15 the memorandum I attached, I know you reviewed it  
16 carefully, I am asking you to ask the State to  
17 tell the Court what evidence they have that would  
18 support seeking the death penalty in this case.  
19 And to determine whether the State actually has  
20 such a good faith basis for asking for the death  
21 penalty in this case. Thank you.

22 THE COURT: Mr. Gant.

23 MR. GANT: Your Honor, insofar as Ms.  
24 Keisman's comments are applicable to my motion, I

1 have nothing further. I will stand on my motion.

2 THE COURT: Mr. Boskey.

3 MR. BOSKEY: Thank you. I will try to be  
4 brief. As to Ms. Keisman's argument as to the  
5 vagueness of the statute or the section of the  
6 statute that charges Mr. Clayborn, the very issue  
7 was decided by a recent Illinois Supreme Court  
8 case, People vs. Odle. I don't have a cite  
9 published. I don't have a cite. I do have a  
10 slip opinion for Your Honor. But the Supreme  
11 Court addresses the very issue, and addresses the  
12 Illinois statute and compares it in relation to  
13 the statute that was found unconstitutional in  
14 the case cited by Counsel. And it was -- The  
15 Supreme Court of Illinois did rationalize it, and  
16 did differentiate it, and did uphold Section  
17 9-1-B7 of the Illinois statute holding in this very  
18 statute if you are charged with murder and it is  
19 found in the aggravating factors that the victim  
20 is 12 years and under, indicative of wanton  
21 cruelty, was sufficient constitutionally and did  
22 uphold that section of the statute.

23 Again, the issue was addressed by the  
24 Illinois Supreme Court. Whether or not there is

1 notice, Judge, I believe -- obviously the  
2 Defendant has been put on proper notice that this  
3 is potentially a capital case, and why it is a  
4 potential capital case, because of the mere  
5 existence of Ms. Keisman to represent him.  
6 The murder task force is assigned to represent  
7 him. Obviously that is sufficient to be put on  
8 notice.

9 THE COURT: Oh, Mr. Boskey.

10 MR. BOSKEY: I didn't mean that to be silly.  
11 I wouldn't do that. Your Honor knows me.

12 Obviously from the discovery and the  
13 nature of the charges and who was the murder  
14 victim, that the Defendant and Counsel has been  
15 put on notice of what the aggravating factor is.  
16 It doesn't have to be in the indictment itself,  
17 as the Courts have held. And the aggravating  
18 factor part of the 12 year old or younger, and  
19 the brutal and heinous and indicative of wanton  
20 cruelty, but it does not have to be specific in  
21 the indictment as Odle has held.

22 I didn't mean to be contrite and I would  
23 not do that. I believe the Defendant has been put  
24 on proper notice to defend himself in what he is

1 being charged with and would be charged with.

2 As to the argument of whether a  
3 Witherspoon jury is again pro State or not, again,  
4 Your Honor, it refers to -- and Counsel refers to  
5 the various studies, and I refer to it, as Your  
6 Honor did earlier, to the various Supreme Court  
7 cases that have held that. Constitutionally, the  
8 Witherspoon jury is not pro State or pro  
9 conviction. And I rest on the Supreme Court cases  
10 that hold thusly.

11 With that, Judge, other than again  
12 having a copy of Odle for Your Honor, I would  
13 again ask that Your Honor, this motion be denied  
14 also.

15 Does Your Honor want it?

16 THE COURT: Yes, I do. Thank you very much.  
17 Response.

18 MS. KEISMAN: Your Honor, under Chapter 38  
19 section 11-3A, it states a charge shall be in  
20 writing and allege the commission of the offense  
21 by stating the name of the offense, citing the  
22 statutory provision, setting forth the nature and  
23 elements of the offense charged, the date, and the  
24 count, the name of the accused, or any other name,



1 and the time as definitely as can be done.

2 The reason the law requires this is so  
3 that again we are put on notice of what we must  
4 defend.

5 Yes, the victim in this case was under  
6 12 years old. I know that. What is it that was  
7 exceptionally brutal or heinous? What is it that  
8 makes this case show that Mr. Clayborn acted in  
9 such a way to exhibit wanton cruelty? When did he  
10 do what things? Where did he do those things?  
11 It's just as simple as the form of the charge.  
12 It's just as simple if you got an indictment that  
13 didn't set forth the charge, where it occurred, or  
14 when it occurred, you can come in and ask to  
15 dismiss this charge. Or even after the trial, we  
16 are moving in arrest of judgement. It was a  
17 defective indictment.

18 The reason we are allowed to do that is  
19 so we can defend the case. We don't get that far  
20 because it's not in the indictment.

21 Now, it comes to my attention through  
22 Mr. Boskey's argument about the Illinois Supreme  
23 Court case, but I don't think it changes the fact  
24 that the United States Supreme Court is unable to

1 define what is exceptionally brutal or heinous  
2 behavior is. That makes it still unclear as to that.  
3 I don't see it changes things. I think that State  
4 still has to show us what the factors are. And I  
5 think they must show a good faith basis for asking  
6 for death penalty in this case. Thank you, Judge.

7 THE COURT: This is another motion that gave  
8 me some trouble. Maybe People vs. Odle will  
9 straighten it out. I did not find Odle in my own  
10 research. And that may be because it's so recent  
11 that I didn't.

12 I don't think that 111 has much to do  
13 with the problem that we have here, because as I  
14 understand the law in this area, the aggravating  
15 factors or the precipitating factors that will  
16 bring about a death penalty hearing, are not  
17 required to be alledged in the indictment,  
18 whatever aggravating factors they may be. Which  
19 perhaps is one of the problems with that statute,  
20 but nonetheless our Court, our Supreme Court, has  
21 consistently held to the best of my knowledge they  
22 at any rate, that those factors need not be  
23 alledged in the indictment.

24 What of course bothers me is whether or

1 not 9-1-B7, in the light of Menard vs. Cartwright,  
2 was constitutionally void on its face. And when  
3 I read Cartwright or Menard, it would seem to me  
4 -- and I did come to the conclusion that absence  
5 some conduct by Illinois that 9-1-B7 is  
6 constitutionally void. The reason that I came to  
7 that decision is because I could make no rational  
8 distinction between the language of the Oklahoma  
9 statute and that of the Illinois statute.  
10 Oklahoma provided that if the death was  
11 "especially heinous, brutal, and atrocious and  
12 cruel". Our statute says in addition to the age  
13 limitation, especially brutal, especially heinous,  
14 no, exceptionally heinous, brutal, indicative of  
15 wanton cruelty. Now that language is almost the  
16 same and certainly for the purpose of trying to  
17 grasp meaning from it, meaning that would be  
18 sufficient to be applied in a even handed way, I  
19 could not in my own mind make any distinction in  
20 the language. While I don't think it's so much  
21 that the Supreme Court of the United States  
22 couldn't define what the terms mean, as I  
23 understood they found that it was not their  
24 purview to define for the State what they mean in

1     their statutes. And since Oklahoma has not  
2     construed that language to narrow its scope and to  
3     bring it into a constitutional permissible posture,  
4     they avoided the death penalty in Menard.

5             On the other hand from a reading of the  
6     opinion, it becomes very clear that had Oklahoma  
7     made any narrowing construction of the statute it  
8     could have perhaps rendered that language  
9     sufficiently certain to avoid a declaration of  
10    unconstitutionality.

11            And so I tried to make some  
12    determination as to whether or not Illinois had  
13    done so. And I look not only at 91B7 but also at  
14    100S-5-3.2, which is the extended term provision of  
15    our statute, which carries the identical same  
16    language. When it talks about a Defendant being  
17    susceptible to an extended term if the crime was  
18    "exceptionally heinous, brutal, and cruel,  
19    indicative of wanton cruelty." And in reading those  
20    cases I came to the conclusion that Illinois, the  
21    statute of Illinois law in regard to that section  
22    of the statute was hodgepodge. That allowed me  
23    not to be able to determine with certainty what it  
24    was, that Illinois had defined these terms to me.

1 But rather it appeared to me on a case by case  
2 basis, depending on whether or not the Court was  
3 sufficiently offended by horrible conduct of the  
4 Defendant, it fell within or without that  
5 language. Which of course was the precise reason  
6 that the United States Supreme Court held the  
7 language to be too vague to be applied in a death  
8 case. They talk in terms of runs through all the  
9 death cases, I suppose. That is that higher  
10 degree of due process that is required in a  
11 capital case than in others. And because this  
12 language was so loose the Court held that it  
13 violated, not the due process clause of the  
14 Fourteenth Admendment, but the Eighth Admendment,  
15 cruel and unusual punishment provision.

16 So I had raised some questions which  
17 perhaps the case that Mr. Boskey just tendered to  
18 me will solve for me. I am not certain. But I  
19 raised four questions that I was going to ask you.  
20 lawyers to further explore for me. And you very  
21 well may want to do that in spite of Odle. I am  
22 going to read Odle and maybe I will come to the  
23 conclusion that I don't need any further  
24 assistance, but you are welcome to assist me

1 further if you think it is necessary. The  
2 questions that I raise are 1), whether Illinois has  
3 provided a constitutionally adequate narrowing  
4 construction to section 9-1-B7. 2) is, has  
5 Illinois construed these terms as used in the  
6 Section 1005-5-3.2, B2. 3), and if so, is the  
7 construction consistent and constitutionally  
8 adequate for death penalty aggravating factor.  
9 That is there are a lot of cases under the  
10 extended term provision. And it is my general  
11 belief-- Well, I expressed my belief or my  
12 analysis of those cases, but yours may differ as  
13 to whether or not the construction there is  
14 adequate for utilization in a death penalty case  
15 in view of the Eighth Amendment. And finally, if  
16 not, can the trial court construe the statute in  
17 such a manner as to avoid a declaration of  
18 unconstitutionality. That is if it's a case of  
19 first impression for me, must I either declare the  
20 statute unconstitutional or can I define these  
21 terms in such a way as to make them constitutional  
22 and hopefully the Supreme Court will agree.

23 Otherwise, we are -- All this could be  
24 avoided if the Defendant knew the name of the

1 game. But those are the questions that I have.  
2 And of course, running with that motion is  
3 counsel's motion to preclude a death penalty  
4 procedure based on that section of the statute.  
5 And what it is saying to me as I understand it is  
6 that I should hold as a matter of a pretrial  
7 procedure conduct a hearing to determine what it  
8 is the Defendant allegedly did, falls within the  
9 constitutionally permissible utilization of that  
10 language. That seems to have some merit of that  
11 motion. Given again, as I say when I read Odle  
12 that position may fall away also. But given the  
13 breath of the language used, it is quite possible  
14 that reasonable people can differ severely as to  
15 whether or not conduct is exceptionally heinous  
16 and brutal and indicative of wanton cruelty. And  
17 if that's the case whether or not the state should  
18 be permitted to engage in the death penalty  
19 procedures which start with Witherspoon, only to  
20 find out that the aggravating factor is not  
21 sufficient on its face to justify submitting it to  
22 the jury.

23 So, I would then at that point after  
24 hearing the State's case achieve in aggravation

1 direct the jury to sign a verdict to find the  
2 Defendant is not eligible for the death penalty  
3 because his conduct did not fall within the  
4 constitutional permissible purview of that lineup.  
5 And the harm to the Defendant seems to me to be  
6 Payton.

7 And that's what I understand Counsel to  
8 be asking me to do as a pretrial matter. And as  
9 I said, I think there's great merit in that,  
10 particularly as I understood the status of this  
11 provision in Illinois law.

12 Again as I said, I will read Odle to  
13 determine whether or not that straightens out any  
14 portion of my fuzziness. I would invite and  
15 encourage you to help me in making that  
16 determination, being mindful of the fact that I am  
17 considering and favoring ordering the State to put  
18 on some evidence as a pretrial matter as to  
19 whether or not the alleged crime in this case  
20 could, by reasonable people, be distinguishable  
21 from all other murders and said to be one which  
22 was exceptionally heinous, brutal, and indicative  
23 of wanton cruelty. For if it is not, we will  
24 avoid the death penalty procedure in all respects



1 including Witherspoon.

2 Now, I note that that rubs against the  
3 grain to some extent. And it may even rub against  
4 some of the decided cases. I have not found a  
5 case, however, that suggests to me that I am  
6 totally impotent in assisting the Defendant in  
7 receiving that degree of due process which the  
8 Court seems to suggest he has the right to. The  
9 highest standard of due process that our Courts  
10 can award to him is what he is entitled to. In  
11 doing that it seem to me that knowledge  
12 beforehand that the State will never get off the  
13 ground, in the only aggravating factor that  
14 appears to be relevant, that it can never get that  
15 kite off the ground. It would be fundamentally  
16 unfair to involve ourselves in all of the other  
17 death penalty procedures.

18 At any rate, that's your task, ladies  
19 and gentlemen. I'm going to hold in abeyance  
20 ruling on the Defendant's motion to declare the  
21 Illinois death penalty Section 9-1-B7 of the  
22 Illinois revised statute unconstitutional. And I  
23 am going to hold in abeyance Julius Clayborn's  
24 motion to preclude the death penalty procedures.

1 Now, as to Mr. Gant's motion to preclude  
2 the death penalty procedures, his is somewhat  
3 different. And as I understand his motion, he  
4 says to me that under the holding, [REDACTED]  
5 [REDACTED], that a Defendant cannot be sentenced to  
6 death unless the State can prove that he [REDACTED]  
7 [REDACTED] who was killed in this case.  
8 And he says that the State does not have any  
9 evidence which would indicate the Defendant had an  
10 intent to kill. Therefore, I should preclude them  
11 from envoking the death penalty procedures.

12 Mr. Boskey, I gave Mr. Gant an  
13 opportunity to address that problem. And he  
14 waived and relied on the motion as presented. Do  
15 you have anything you would like to say?

16 MR.BOSKEY: I would in brief comment, Judge.  
17 Obviously the factors that Counsel would mention  
18 would be something that we would have to prove in  
19 Court. And to do it on a pretrial motion, to say  
20 that we don't have some evidence or not, I don't  
21 think is proper. It holds for facts in evidence  
22 to be presented during the course of trial. We  
23 have alleged in the complaint before Your Honor  
24 what [REDACTED], intentionally and

1 knowingly killed the victim in this matter. We  
2 have also charged the aggravated criminal sexual  
3 assault, which would be the death qualifier, if  
4 you will. I don't believe as a matter of law we  
5 have to do anything further at this stage, Judge,  
6 than to put the Defendant on notice what he's  
7 being charged with, what we are in effect  
8 expecting to prove, and to go further doing the  
9 course of trial. I don't think we are required by  
10 any constitutional provision to do any more than  
11 that at this stage.

12 THE COURT: Mr. Gant.

13 MR. GANT: I have no comment, Judge.

14 THE COURT: All right. I think that under  
15 Enmund vs. Florida is distinguishable from Mr.  
16 Hendricks. To begin with, this Defendant is  
17 charged with count one of the indictment with the  
18 offense of first degree murder, in that he without  
19 lawful authority strangled and killed Denise  
20 Johnson. Well that's count two. In count one of  
21 the indictment he's charged with unlawful  
22 justification, intentionally and knowingly  
23 strangled and killed. He's charged with, in count  
24 three, with the first degree murder, in while

1 committing a forcible felony, he kidnapped,  
2 strangled, and killed. In count four he's charged  
3 with first degree murder, while committing a  
4 forcible felony, to-wit criminal sexual assault.  
5 He's charged with a number of sexual assaults and  
6 aggravating kidnapping, and things of that nature.  
7 Which if proven beyond a reasonable doubt would  
8 bring him within the purview of Section 9-1-B7.  
9 That is the aggravating factors. And I don't  
10 think it's true that Enmund, as I read it,  
11 provided that the Defendant had to intend to kill.

12 What I read in Enmund and the quote I  
13 would like you to consider, which comes from  
14 People vs. Jones at 94 Illinois 2nd 275, at page  
15 299, the Illinois Supreme Court says in Enmund vs.  
16 Florida, the Supreme Court held that the Defendant  
17 could not be put to death for two killings that  
18 he did not commit and had no intention of  
19 committing or causing. The operative language  
20 there is did not commit or had no intention of  
21 committing. The indictment in this case  
22 straightforwardly and without ambiguity charges  
23 this Defendant with having committed the offense  
24 of first degree murder. Which of course is

1 different altogether from the holding of Enmund.

2           There's also another case, and the name  
3 of it is trying to escape me. It's a case out of  
4 Arizona where two brothers broke their father and  
5 another prisoner out of the Arizona State  
6 Penitentiary. At some point in time while they  
7 were fugitives, the father killed two people  
8 without cause or provocation. And the Defendant  
9 brothers did nothing. They were not involved in  
10 the killing. And it doesn't appear they knew the  
11 killing was going to take place. And in a classic  
12 sense aided or abetted. Except that they had been  
13 immensely involved in the original escape. And  
14 the Supreme Court upheld the death sentence in  
15 that case. Notwithstanding the fact that there  
16 was no intent on the part of those Defendants to  
17 kill and no indication whatsoever that they had  
18 been involved in the actual killing itself.

19           So I don't think that the argument in  
20 the Hendricks case is well taken and consequently  
21 his motion to preclude the death penalty  
22 procedure is denied.

23           Now that then leaves insofar as the  
24 Defendant Clayborn is concerned his motion to

1 declare the Illinois death penalty statute  
2 unconstitutional. And I'm not certain that the  
3 motion is distinguishable from the motion that  
4 addresses itself to the question of 9-1-B7. Is it?

5 MS. KEISMAN: It doesn't include 9-1-B7,  
6 Judge. It attacks other provisions of the  
7 statute.

8 THE COURT: I will hear your argument on  
9 this one.

10 MS. KEISMAN; I waive argument and rest on  
11 the allegation in the motion.

12 THE COURT: The State.

13 MR. BOSKEY: I would argue that the various  
14 Illinois Supreme Court cases in the past few years  
15 have upheld the constitutionality of the Illinois  
16 statute. I would rest on that.

17 THE COURT: Yeah, the precedence is  
18 overwhelming on me. Unless I'm going to -- which  
19 I'm not -- undertake to decide that the Illinois  
20 Supreme Court has been consistently wrong. I  
21 would love an opportunity to do that. But I guess  
22 the only way for me to do that is to wind up as a  
23 Justice of the Illinois Supreme Court, which I'm  
24 not and doesn't look very fruitful for that

1       happening. So I am constrained by the law to deny  
2       your motion for -- To declare the death penalty  
3       statute unconstitutional.

4               Now, Ms. Keisman, I think that takes  
5       care of all the motions. Am I correct?

6               MS. KEISMAN: Yes.

7               THE COURT: What's the status of discovery so  
8       far as Mr. Clayborn is concerned?

9               MR. BOSKEY: We have obviously been tendering  
10      documents and what have you during the course of  
11      this. This is a motion to quash arrest.

12              MS. KEISMAN: That's correct.

13              MR. BOSKEY: We can perhaps set that for the  
14      same date Your Honor is going to make your final  
15      ruling on one motion pending. Perhaps a date  
16      convenient to Ms. Keisman. Judge, perhaps Tuesday,  
17      April 11th will be best for both our schedules and Ms.  
18      Keisman. She will be on trial the following week.

19              THE COURT: By agreement?

20              MR. BOSKEY: By agreement.

21              MS. KEISMAN: Yes, Judge.

22              THE COURT: By agreement as to Mr. Clayborn,  
23      April the 11th. With subpoenas for hearing on the  
24      Clayborn's motion.

1 (Thereupon, the case was passed  
2 and later recalled, at which  
3 time the following proceedings  
4 were had:)

5 THE CLERK: People versus Jerome Hendricks.

6 THE COURT: Mr. Gant, any remaining motions  
7 which you have pending, you can address in any  
8 order that you choose, informing us as to which  
9 motion you are talking about before you proceed.

10 MR. GANT: Very well, your Honor.

11 I will proceed on my motion that was  
12 filed today. A motion to declare the Illinois  
13 Death Penalty Unconstitutional.

14 THE COURT: Yes. You did file that today,  
15 didn't you?

16 Did you give me a copy of that motion?

17 MR. GANT: Yes.

18 THE COURT: Yes, you did.

19 I have it.

20 MR. GANT: That motion is substantially  
21 identical to the motion prepared on behalf of Mr.  
22 Clayborn by Miss Keisman.

23 THE COURT: You want to elaborate on your  
24 motion at all?



1 MR. GANT: No.

2 I will stand on the motion.

3 THE COURT: Mr. Boskey.

4 MR. BOSKEY: Again, Judge, briefly, as to the  
5 constitutionality of the Death Penalty Statute has  
6 been upheld by the various rulings of the Supreme  
7 Court.

8 The Illinois Supreme Court has addressed  
9 all the issues posed by Counsel in its -- in his  
10 motion.

11 As to the sentencing hearing itself, as  
12 to it was discretion on the part of the State's  
13 Attorney. We would rely on the various Illinois  
14 Supreme Court rulings. They have upheld the  
15 constitutionality of the Death Penalty Statute.

16 THE COURT: Mr. Gant, anything further?

17 MR. GANT: No.

18 THE COURT: The defendant's motion to declare  
19 the Illinois Death Penalty Statute  
20 Unconstitutional is denied.

21 MR. GANT: Next, your Honor, is the motion to  
22 prohibit death qualification of the jury in the  
23 guilt/innocence stage of the trial.

24 THE COURT: Since that would be particularly

1 prejudicial in light of the proposed insanity  
2 defense; you got that one, you can withdraw that.

3 You're going to withdraw that one?

4 MR. GANT: Yes.

5 May I proceed, your Honor?

6 THE COURT: Yes.

7 MR. GANT: Your Honor, I would like to  
8 direct, if I may, your attention to the second  
9 page, paragraphs 4 and 5.

10 As a matter of fact, those two  
11 paragraphs very succinctly set out our position in  
12 this regard.

13 As your Honor well knows, the trial of  
14 the capital murder case is divided into two  
15 phases. It's a bifurcated trial.

16 One of the things that your Honor is  
17 going to have to do, assuming that there's a  
18 finding of guilty in this case, and the State then  
19 decides to proceed to a death penalty sentencing  
20 hearing, you are going to have to instruct the  
21 jury, assuming that there will be one, that their  
22 concern about the death penalty can in no way, and  
23 should in no way have any bearing on their  
24 decision regarding the guilt or innocence stage of

1 the trial.

2 And your Honor will be required to  
3 instruct the jury to do that because the law quite  
4 clearly says there are separate and distinct kinds  
5 of burdens and kinds of decisions that have to be  
6 made.

7 I am suggesting to your Honor if that is  
8 in fact the law, why then would it be necessary to  
9 Witherspoon a jury at the guilt and innocence  
10 phase? Because once you start to Witherspoon  
11 them at the guilt or innocence phase, right away  
12 they realize that this is going to be a death  
13 case.

14 That in and of itself, just the  
15 knowledge of that, may well tend to influence the  
16 jury in terms of guilt and innocence insofar as  
17 what they should do at that point, long before we  
18 get to -- if we do at all -- long before we get  
19 to a hearing on life or death.

20 For that reason I am suggesting to your  
21 Honor that since the sentencing phase has no  
22 bearing on guilt or innocence, then the jury  
23 should not be Witherspooned at that point, that is  
24 at the guilt or innocence stage.

1           That's what this motion is directed at,  
2 your Honor.

3           THE COURT: Mr. Boskey.

4           MR. BOSKEY: Judge, again, briefly, the  
5 Illinois Supreme Court has addressed this very  
6 issue on numerous, numerous occasions. And has  
7 held that Witherspooning, as a matter of law, is  
8 not unconstitutional.

9           It doesn't call for a necessity pro-  
10 conviction or pro-State jury. And, in fact, the  
11 Supreme Court even dictates that if we would be  
12 seeking the death penalty, the jury would have to  
13 be Witherspooned if we use that jury in the death  
14 phase part of the capital case.

15           I believe the law is clear. The Supreme  
16 Court is clear. And it dictates that  
17 Witherspooning is proper and should be done in  
18 capital cases.

19           We would rest on the various Illinois  
20 Supreme Court cases, beginning with Gacey and  
21 others that indicate that Witherspoon is proper in  
22 death cases.

23           THE COURT: Mr. Gant.

24           MR. GANT: I have nothing further, your

1 Honor.

2 THE COURT: In paragraph 8 of the Defendant's  
3 motion, asserts that despite the recent decision  
4 in Lockhart versus McGee, this Honorable Court can  
5 and should, as a matter of due process and equal  
6 protection recognize that Witherspoon juries are  
7 conviction prone.

8 The problem, however, is that he doesn't  
9 tell me how I can do that in light of Lockhart,  
10 without disregarding it.

11 And while I don't necessarily agree with  
12 the Lockhart Court, nonetheless it is the highest  
13 Court in the land, and nonetheless, I think the  
14 evidence seems to proliferate in favor of the  
15 argument that Witherspooning eschews the jury in  
16 several respects.

17 Nonetheless the Supreme Court has held  
18 that even if that is true, it does not reach to  
19 the level of Constitutional impermissibility. And,  
20 of course, the cases in Illinois are numerous that  
21 Witherspooning does not offend the Illinois  
22 Constitution or the United States Constitution.  
23 And, indeed, if we have a capital situation, the  
24 jury must be Witherspooned.

1           There are some ways which are suggested  
2     in the reports for the defendant to avoid that,  
3     but the consequences of doing that requires the  
4     relinquishment of other valuable Constitutional  
5     Rights.     The defendant is perhaps placed upon the  
6     horns of a dilemma.

7           But nonetheless if the defendant elects  
8     to try his case to a jury, the jury is going to be  
9     Witherspooned under the law of Illinois, and  
10    there's nothing in the cases decided by the United  
11    States Supreme Court or any other Federal Court  
12    that I am aware of that would be sufficient to  
13    overcome the status of the law in Illinois.

14           Accordingly, the defendant's Motion to  
15    Prohibit Death Qualification of the jury during  
16    the guilt/innocence stage of the trial is denied.

17           MR. GANT: Your Honor, you have before you a  
18    motion entitled: Motion to preclude the State  
19    from Death Qualifying a potential jury, or, in the  
20    alternative, a motion or a hearing to determine  
21    that there is a substantial probability that the  
22    defendant is eligible for the death penalty.

23           THE COURT: You may proceed.

24           MR. GANT: In light of your Honor's ruling on

1 the previous motion, and in light of your Honor's  
2 ruling on the motion entitled motion to preclude  
3 the death penalty procedure, I will adopt the  
4 arguments made on that motion, and incorporate  
5 them by reference, to the present motion.

6 I have nothing further.

7 THE COURT: Mr. Boskey.

8 MR. BOSKEY: Again, for the same reason  
9 stated, Judge, I believe death qualifying or  
10 Witherspooning, if you will, the jury, on a  
11 capital case is mandated by the Supreme Court of  
12 Illinois.

13 In addition to that, Judge, I am aware  
14 of no, nothing in the previous cases that's before  
15 the Illinois Supreme Court that will indicate that  
16 there should be a separate hearing to see if  
17 there's a substantial probability that the  
18 defendant is eligible for a death penalty.

19 Your Honor is aware of the charges that  
20 Mr. Hendricks is charged with. He's charged with  
21 both murder, as well as various, quote, forcible  
22 felonies, which would death qualify the defendant  
23 if he was guilty.

24 I believe the State does not have a

1     burden to go further than that, Judge. There's  
2     nothing in the Constitution or in the Supreme  
3     Court decisions that would indicate before we seek  
4     the death penalty that we should have a separate  
5     preliminary hearing, if you will, on that issue,  
6     on whether or not there's a substantial  
7     probability.

8             That is not mandated by the Statute or  
9     by any of the court decisions.

10            We would ask that this motion also be  
11     denied.

12            THE COURT: Response, Mr. Gant.

13            MR. GANT: I have nothing, your Honor.

14            THE COURT: All right.

15            This motion is somewhat different, or  
16     substantially different from the motion presented  
17     by Mr. Clayborn. In that this, the aggravating  
18     factors that would make Mr. Hendricks eligible for  
19     the death penalty, are apparent. That is, he is  
20     charged with felony murder and several counts of  
21     the indictment -- He's charged with other  
22     forcible felonies including aggravated sexual  
23     assault, aggravated kidnapping, and one or two  
24     others.



1           So that his ability to determine, if  
2 convicted of all of those charges, whether or not  
3 he would be death eligible, does not depend upon  
4 his ability to construe language which the Supreme  
5 Court has heretofore said is too broad to be  
6 utilized in a capital sentencing hearing.

7           So this defendant's motion to prohibit  
8 death qualifying of the jury is denied.

9           MR. GANT: Your Honor, might we move now to  
10 the series of motion that involve discoverable --  
11 pardon me, discovery requests.

12           The first one, motion to produce the  
13 record on all Juvenile Court proceedings.

14           I will then take the next motion, which  
15 will be a motion to compel the Prosecution to  
16 disclose any non-statutory aggravating factors.

17           And then, finally, the Motion for  
18 Discovery and a Bill of Particulars as to  
19 aggravation.

20           THE COURT: All right.

21           MR. GANT: Judge, with regard to motion to  
22 discovery of Juvenile records, I haven't received  
23 any recent response indicating the State's  
24 objection.

1 I suggest it will be a number of  
2 witnesses in this case, with at least two who are  
3 juveniles and others who, through my own  
4 investigation I have learned do have some prior  
5 contact with the Juvenile Court.

6 I have listed the names of those  
7 possible witnesses. These witnesses undoubtedly  
8 will be State witnesses.

9 Under Davis versus Alaska, in terms of  
10 the Defense being in a position to impeach the  
11 credibility of the witnesses, I don't think  
12 there's any question but in a case, especially a  
13 capital case, that this kind of information is  
14 certainly discoverable.

15 Not only is it discoverable, Judge, but  
16 given the facts and circumstances of this case, it  
17 is extremely crucial.

18 For that reason and the argument set out  
19 in the motion, we ask that your Honor grant our  
20 request.

21 THE COURT: Mr. Boskey.

22 MR. BOSKEY: Judge, I will run the various  
23 records that the People have put on his motion.  
24 Depending on what shows up, there might be a

1 motion in limine. But I will comply with this  
2 motion.

3 THE COURT: All right. The Defense motion  
4 to compel the disclosure of Juvenile Court records  
5 regarding the witnesses is granted.

6 MR. GANT: The next motion, your Honor, is a  
7 motion to compel the Prosecution to disclose any  
8 non-statutory aggravating factors that they intend  
9 to present at the sentencing hearing, should there  
10 be one.

11 And we rely specifically on Gardner  
12 versus Florida in our request for that  
13 information.

14 MR. BOSKEY: I will comply with that motion,  
15 and the motion to discovery and the Bill of  
16 Particulars, as to aggravation. I will comply to  
17 both.

18 THE COURT: Without objection both motions  
19 are granted.

20 That is, the Defendant's Motion to  
21 Compel the Prosecution to Disclose any non-  
22 statutory aggravating factors that were -- they  
23 will present at the sentencing hearing. And the  
24 defendant's motion to discovery and a Bill of

1 Particulars as to aggravation, are both granted  
2 without objection.

3 MR. GANT: Your Honor, the next series of  
4 motions involve matters that might well best be  
5 left until such time as we are on the eve of  
6 trial.

7 Those three motions are motions for  
8 certain orders regarding pre-trial publicity in  
9 this case.

10 THE COURT: All right.

11 MR. GANT: Motion for attorney participation  
12 that is his full participation in voir dire.

13 THE COURT: All right.

14 MR. GANT: And motion for individual  
15 sequestered voir dire.

16 THE COURT: All right. We might as well  
17 decide them now.

18 MR. GANT: We will stand on the motion as  
19 drafted, your Honor.

20 Mr. Boskey.

21 MR. BOSKEY: As for the motion regarding pre-  
22 trial publicity, I have no objection.

23 I don't know if Counsel is referring to  
24 a gag order type of situation. I have no problem

1 with that.

2 Is that what you mean?

3 MR. GANT: Yes.

4 And there was at the time of the offense  
5 a good deal of print, publicity, your Honor. I am  
6 primarily concerned with that. Any kind of  
7 publicity that may arise once that case goes to  
8 trial.

9 THE COURT: As I read this motion, it is not  
10 only directed towards Counsel in the case, but as  
11 I understand it, he's asking me to bar the press  
12 from pre-trial proceedings in this case.

13 MR. GANT: Judge, if I may just address you  
14 on that.

15 In light of at least two recent rulings  
16 involving the Circuit Court of Cook County, I  
17 don't know whether -- if you think -- I don't know  
18 whether or not you would have the authority to do  
19 that anyway.

20 I certainly would not be in a position  
21 to ask your Honor to do something the Court didn't  
22 have authority to do.

23 Insofar as the request, I request you to  
24 do -- ask you to do that, at this point we ask

1 that portion be stricken.

2 THE COURT: All right. Then there's nothing  
3 else left to this motion.

4 It seems to me that the rules of  
5 professional responsibility, in particular Rule  
6 7-107, covers this aspect insofar as Counsels are  
7 concerned.

8 And without trying to verbatim state the  
9 rule, essentially the rule says that neither  
10 Counsel should indulge in any out-of-Court  
11 statements that likely will impede the defendant's  
12 ability to receive a fair and impartial trial.

13 That's a matter of disciplinary rule.  
14 And I assume and I'm certain that both sides will  
15 comply with the rules in all respects.

16 MR. BOSKEY: Judge, as to the motion for  
17 attorneys' participation in voir dire, obviously  
18 that is discretionary within your Honor's  
19 discretion.

20 My personal indication from my past  
21 history is not my request, but I believe it is  
22 under your Honor's discretion. And I would leave  
23 it up to your Honor's discretion, as to that  
24 particular motion.

1           As to the defendant's other motion,  
2 motion for individual voir dire and sequestering  
3 of the jury during the voir dire process, it is  
4 becomming more and more -- it's been done in this  
5 very building twice in the last month.

6           I have no objection.

7           MR. GANT: Again, on those two motions a lot  
8 of that depends on the kind of publicity that may  
9 or may not develop. It may not be necessary. But  
10 I thought that it was just the smart thing to do,  
11 to put this request in writing before your Honor,  
12 at this time, just to let the Court know that I am  
13 at least cognizant of the possibility there may be  
14 such publicity and if so, these requests might be  
15 a way to obviate it.

16          THE COURT: All right. These motions also  
17 have impact without regard to whether or not that  
18 publicity emerges at trial. It also has some  
19 impact if the jury is going to be Witherspooned,  
20 particularly, the motion for sequestered venire  
21 examination.

22           It would be important in Witherspooning  
23 the jury so as not to contaminate the jury by the  
24 response of a few.

1 I will grant both motions. If they  
2 become necessary for one reason or another, we can  
3 always address it at the trial. Right now they  
4 are granted.

5 MR. GANT: Your Honor, with that there is  
6 presently pending before you a motion to waive  
7 jury for death eligibility phase or sentencing.  
8 We are withdrawing that at this time.

9 THE COURT: All right.

10 MR. GANT: Also a motion before you for  
11 hearing on proportionality. We are withdrawing  
12 that at this time.

13 THE COURT: All right.

14 MR. GANT: And according to my tally sheet,  
15 that is it.

16 THE COURT: Well, your tally sheet is wrong.

17 MR. GANT: That's why you are a Judge and I  
18 am just a lawyer.

19 THE COURT: You have a motion to allow Mr.  
20 Hendricks the right of allocution.

21 MR. GANT: That's correct. You're absolutely  
22 right. My fault, Judge.

23 We will stand on the motion as drafted.

24 THE COURT: Mr. Boskey.



1 MR. BOSKEY: Again, we would oppose this  
2 motion.

3 Whether or not a defendant in a capital  
4 case has a right of allocution has been decided by  
5 the Illinois Supreme Court, and various other  
6 Supreme Court decisions.

7 Most recent that I'm aware of, People  
8 versus Perez, that's 108 Ill. 2d, page 70. I  
9 believe the same issue has been addressed in  
10 People versus O'Toole and several other Illinois  
11 Supreme Court cases that indicate that the  
12 Defendant does not have a Constitutional Right to  
13 allocution, that is to give an unsworn statement to  
14 the jury.

15 We would oppose this motion.

16 THE COURT: Mr. Gant.

17 MR. GANT: I have no response, Judge.

18 THE COURT: All right.

19 At least in People versus Gaines, and in  
20 a number of other cases, the Illinois Supreme  
21 Court has ruled that an Illinois defendant has no  
22 such right of allocution. Although he or she would  
23 have such a right in a non-capital case before the  
24 jury that the defendant chooses, must take the

1 oath and testify, otherwise he doesn't have a  
2 right.

3 So your motion to allow the defendant  
4 the right to allocution is denied.

5 You also have, Mr. Gant, a motion to  
6 prohibit consideration of arrest not resulting in  
7 convictions, during the aggravation and mitigation  
8 phase of sentencing hearing, and a memorandum of  
9 law in support thereof.

10 The memorandum of law did not accompany  
11 the document.

12 MR. GANT: I saw that in the file.

13 I don't have a copy of that motion  
14 myself. May I view it?

15 Your Honor, we would ask that motion be  
16 withdrawn at this time.

17 THE COURT: I have a motion to bar the death  
18 penalty sentencing hearing under 9-1(b) and to bar  
19 imposition of the death penalty.

20 MR. GANT: You ruled on that one.

21 THE COURT: I denied it.

22 MR. GANT: Yeah, you denied that earlier.

23 THE COURT: I have a motion to preclude the  
24 death -- the State from death qualifying also.

1 I ruled on that also.

2 MR. GANT: You did earlier.

3 THE COURT: I take it, Mr. Gant, that  
4 concludes all of your motions now?

5 MR. GANT: It does.

6 THE COURT: Where do we stand with discovery?

7 MR. GANT: We are still a number of pieces,  
8 Judge, still missing.

9 If you will indulge us just one status  
10 date so I can sit down and go over with Counsel my  
11 list. Then we can set it for trial.

12 MR. BOSKEY: That's fine.

13 THE COURT: What day would you like to come  
14 back to visit us?

15 MR. GANT: Friday, April 14th, your Honor.

16 MR. BOSKEY: Fine.

17 THE COURT: By agreement, April 14th.

18 MR. GANT: Thank you, Judge.

19 (Whereupon, the above entitled cause  
20 was continued, by agreement,  
21 to April 14, 1989.)  
22  
23  
24

1 STATE OF ILLINOIS )  
2 COUNTY OF C O O K ) SS:

3  
4 IN THE CIRCUIT COURT OF COOK COUNTY  
COUNTY DEPARTMENT-CRIMINAL DIVISION

5 THE PEOPLE OF THE )  
6 STATE OF ILLINOIS ) IND. NO. 88 CR 12517  
7 VERSUS ) CHARGE: Murder, Agg.  
8 JEROME HENDRICKS ) Crim. Sex. Ass., Agg.  
Kid., Unlaw. Restraint

9 REPORT OF PROCEEDINGS

10 BE IT REMEMBERED that on Tuesday,  
11 February 27, A.D. 1990, this cause came on for  
12 hearing before the Honorable LEO E. HOLT,  
13 Judge of said Court, upon the Indictment herein,  
14 the Defendant having entered a plea of not guilty.

15  
16 APPEARANCES:

17 HON. CECIL PARTER,  
18 State's Attorney of Cook County, by  
19 MS. MARY MALLO, MR. EDWARD RONKOWSKI,  
Assistant State's Attorneys  
appeared for the People;

20 MR. RANDOLPH STONE,  
21 Public Defender of Cook County, by  
22 MS. MARIJANE PLACEK, MR. VINCENT LUFRANO  
Assistant Public Defenders  
appeared for the Defendant.

23 BETTE N. SACKS, C.S.R.,  
24 Official Court Reporter

1 THE CLERK: Jerome Hendricks.

2 MR. RONKOWSKI: We are ready.

3 My partner is bringing the witnesses  
4 down.

5 MS. PLACEK: This is our motion to quash and  
6 suppress. And it is our burden to go ahead for  
7 it.

8 Unless Counsel needs his partner down  
9 here, we can go ahead right now.

10 THE COURT: I need a five minute recess to  
11 clear the cobwebs from my head, so I can give your  
12 case my undivided attention.

13 (Thereupon, a short recess  
14 was taken, after which the  
15 following proceedings were had:)

16

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1 THE CLERK: Jerome Hendricks.

2 THE COURT: As I read the motion, the  
3 defendant has the burden of going forward, and the  
4 burden of persuasion.

5 I will hear any opening statements.

6 MS. PLACEK: Judge, in this particular  
7 matter, I notice that the State has brought  
8 certain rebuttal witnesses down.

9 I believe they would be the police  
10 officers that they would call when they feel  
11 necessary to rebut our case.

12 I would, of course, make a motion to  
13 exclude.

14 I have a note saying that although I am  
15 a stranger in a strange land, and my practice is  
16 not normally in this building, that it is  
17 somewhat, since there is a back door, easy to be  
18 heard and to hear.

19 Since I am also partially deaf and have  
20 the occasion of speaking rather loudly, I would  
21 ask that the --

22 MR. RONKOWSKI: I have had some experience  
23 with Ms. Placek.

24 I have never known her to be deaf. But

1 she does talk loudly. And I have no objection  
2 that they go into the jury room.

3 THE COURT: Why don't you go put them in the  
4 jury room or the State's witnesses' room around  
5 the corner?

6 MR. RONKOWSKI: That is kind of cold. They  
7 turned the heat off.

8

9

OPENING STATEMENTS

10

BY MS. PLACEK:

11

Judge, in this particular

12

matter, the simplicity of the case hedges over one  
13 issue and one only. And that is when in fact the  
14 arrest of my client, Jerome Hendricks, took place.

15

16

17

18

19

20

The particular issue is that it is the  
defendant's contention at this particular time,  
and we believe that it will be shown through the  
evidence that on August the 8th, the defendant was  
in fact, during the evening hours, sitting in his  
home.

21

22

23

24

The evidence will further show that he  
was told by his mother that the police had wanted  
to speak to him. He, quite frankly, wishing to  
cooperate with the police, and there in fact being

1 no evidence to rise to the level of either  
2 probable cause or for that matter serious  
3 suspicion as to their investigation, called the  
4 police and invited them to in fact his home for  
5 the purpose of this conversation.

6 Now, when I say invited to his home, I  
7 believe that the evidence from the stand will  
8 further reveal that, number one, he never  
9 consented to go anywhere with the police, because  
10 that becomes the next issue.

11 Because as soon, almost as soon as he  
12 put down that phone telling the police detective  
13 in fact that he was at home and would be perfectly  
14 willing to speak to him at his home, he then  
15 picked up the phone again. And while on the phone  
16 with his sister, who happened to live in Maywood,  
17 more or less discussing both family business and  
18 the happenings of the day, ~~there was a knock~~  
19 almost immediately on the door.

20 Now, ~~that knock at the door was opened~~  
21 ~~by his mother.~~ His mother opened the door, and  
22 the police then ~~ran upon the defendant~~, using  
23 ~~profanity~~, ~~swearing at him~~, that he better put  
24 down that phone, and were ready to ~~handcuff him~~



1 at that particular time.

2 When they were ready to handcuff him,  
3 quite frankly the defendant looked at them in  
4 somewhat of astonished amazement and said: "Why  
5 are you handcuffing me? Why are you seeking to  
6 possibly do anything to me, when ~~he said he would~~  
7 ~~if I'm in this house, and in fact talk to you~~ about  
8 whatever you wanted to talk to me about?"

9 Again, we got a barrage of profanity  
10 from the police and again we had what can be  
11 likely called an altercation, because the police  
12 did not come alone.

13 You will hear from the stand that  
14 several people were in fact at this time involved  
15 in this arrest, not only involved in this arrest,  
16 but it took place in fact within the realm of the  
17 defendant's own home while he was in the living  
18 room, or living room area, after being pushed off  
19 the phone and literally continuing and resisting  
20 to be handcuffed, and continually saying to the  
21 police, "I thought all you wanted to do was talk  
22 to me. Well, talk to me."

23 He was then ~~handcuffed~~, ~~taken to the~~  
24 ~~police station~~, and at that particular time, after

1 several long hours, ~~never consenting either to go~~  
2 ~~with them~~, never ~~consenting to be handcuffed~~,  
3 what happened was certain evidence was  
4 in fact taken from the defendant.

5 This is the evidence that is a result of  
6 the motion to quash that we are also seeking to  
7 suppress before your Honor.

8 What we will show, and what we believe  
9 the evidence will warrant from the stand, is,  
10 number one, that the police had no cause to either  
11 come into the defendant's house and ~~arrest~~ him in  
12 that manner, for they had ~~no warrant~~, nor in fact  
13 did they have ~~probable cause to make such an~~  
14 ~~arrest in the alternative~~.

15 The law also points that out in the  
16 State of Illinois under existing factual  
17 situations.

18 And the police will deign testify in  
19 rebuttal to my client's statement that they did  
20 not even have evidence enough where they could  
21 take to a Judge and ask for a warrant for my  
22 client's arrest for the simple reason, Judge, that  
23 he had shown in the past no pattern for flight.  
24 He had shown no exigent circumstance which would

1 in fact cause such arrival at his house at that  
2 particular time.

3 At the conclusion of this evidence, your  
4 Honor, we would ask for a finding sustaining our  
5 motion and in fact suppressing the items that in  
6 fact we spoke of earlier.

7 Thank you, your Honor.

8 THE COURT: State.

9  
10 OPENING STATEMENTS

11 BY MR. RONKOWSKI:

12 Briefly, as Counsel indicates, there is  
13 an issue as to when the police arrested the  
14 defendant.

15 There is also the containing issue as to  
16 whether or not probable cause existed at the time  
17 of the arrest.

18 And as Counsel stated, you will hear  
19 evidence that the defendant called the police and  
20 initiated that contact.

21 Before the police even met the  
22 defendant, they knew the following: victim, age  
23 12, was found dead with some ligatures around the  
24 neck. Citizens indicated to the police, numerous

PUBLIC OPINION IS NO BURDEN OF PROOF

1 citizens, that the defendant was the last person  
2 to be seen talking to the victim when she was  
3 alive. Her body had been discovered in the  
4 vicinity of where the defendant lived.

5 Also, the police knew, based on  
6 information that was given them, and a record  
7 check, that the defendant had an arrest for  
8 contributing to the sexual delinquency of a 13  
9 year old victim.

10 MS. PLACEK: Objection.

11 THE COURT: If this is opening statements,  
12 and the evidence doesn't show that, it doesn't  
13 show it.

14 But he can state what he thinks the  
15 evidence will show.

16 The objection is overruled.

17 MR. RONKOWSKI: A 13' year old victim where  
18 the crime occurred next door to where the body  
19 was found.

20 Also, he was on parole for raping and  
21 choking a 15 year old victim.

22 MS. PLACEK: Continuing objection.

23 THE COURT: The objection is noted for the  
24 record, and it is overruled.

1 MR. RONKOWSKI: Counsel also mentioned that  
2 the defendant called the police. She failed to  
3 mention why.

4 ~~There was a crowd outside~~ that can be  
5 described as unruly, and directed toward the  
6 defendant's attention.

7 It was the defendant who called the  
8 police, asking the police to clear his name. The  
9 defendant was unable to clear his name and  
10 admitted to some sexual contact with the 12 year  
11 old victim.

12 It was not until then that the defendant  
13 was arrested.

14 At the conclusion of the case, we ask  
15 you to deny the defendant's motion to suppress.

16 THE COURT: Please call your first witness.

17 MS. PLACEK: Judge, we would call Mr.  
18 Hendricks.

19 (Witness sworn)  
20  
21  
22  
23  
24

1 JEROME HENDRICKS,  
2 the Defendant herein, was called as a witness in  
3 his own behalf, having been first duly sworn, was  
4 examined and testified as follows:

5 DIRECT EXAMINATION

6 BY

7 MS. PLACEK:

8 Q State your name for the purposes of the  
9 record, spelling the last name for the court  
10 reporter, please.

11 A Jerome Hendricks, H-e-n-d-r-i-c-k-s.

12 Q How old are you today?

13 A 28.

14 Q Calling your attention to August the  
15 8th, 1989 (sic), during the early evening hours,  
16 could you tell his Honor, Judge Holt, exactly  
17 where you were?

18 A Yes, ma'am.

19 I was at home.

20 Q When you say at home, did anyone share  
21 that home with you?

22 A Yes, my mom.

23 Q And what is your mother's name?

24 A Earline Hendricks.

1 Q Now, you say you were at home. Did  
2 anything unusual happen?

3 Excuse me. May I withdraw and rephrase  
4 your Honor?

5 THE COURT: You may.

6 MS. PLACEK: Thank you.

7 Q Did you do anything unusual that  
8 evening, on that August 8th date?

9 A Well, I came in and I was told the  
10 police wanted to talk to me.

11 Q Now, when you say you were told the  
12 police wanted to talk to you, who told you that?

13 A My mom.

14 Q And when you found that out, what, if  
15 anything, did you do?

16 A I called the Chicago police.

17 Q And when you called the Chicago police,  
18 what, if anything did you say to the police?

19 A That I was home now, and that I was  
20 ~~telling to talk to them.~~

21 Q And when you say you were willing to  
22 talk to them, what, if anything, did you do after  
23 you hung up the phone?

24 A I waited on the police and called my

1 sister.

2 Q When you say you waited on the police  
3 and called your sister --

4 By the way, how soon after you called  
5 the police did you call your sister?

6 A Just minutes after.

7 Q And did anything unusual happen while  
8 you were on the phone with your sister?

9 A Yes, it did.

10 Q Could you tell his Honor, Judge Holt,  
11 what exactly happened?

12 A There was a knock at the door, and my  
13 mom opened the door.

14 Q Now, I am sure Judge Holt nor myself  
15 have ever been in your house.

16 Could you tell his Honor, Judge Holt,  
17 how far away this phone was from the door you  
18 spoke of?

19 A About maybe eight feet, nine feet. .

20 Q Would it be correct to say that the  
21 door, the telephone is in front of the door in a  
22 hall?

23 A No, it wouldn't.

24 Q Then describe it for us, please.



1           A       It would be a living room area and  
2 dining room area and a kitchen area.

3           A       Okay. And when you say about eight  
4 feet, did you hear anything when the door -- or,  
5 excuse me, strike that.

6                   May I withdraw and rephrase, your  
7 Honor?

8           Q       Who answered the door, if you know?

9           A       My mother did.

10          Q       And when your mother answered the door,  
11 what, if anything happened?

12          A       Yes, it did. ~~The police rushed in the~~  
13 ~~house.~~

14          Q       And when you say the police rushed in  
15 the house, how did you know they were police?

16          A       I would assume they were police.

17          Q       And tell his Honor, Judge Holt, why you  
18 made that assumption?

19          A       Because I called them, and they said  
20 they were on their way to come and talk to me.

21          Q       Now, you described them as rushing in  
22 the house.

23                   What was the first thing they did when  
24 they in fact got in the house?

1 A They ordered me to get off the phone.

2 Q And what, if anything, did you do?

3 A I hung up the phone.

4 Q Now, when you say they, how many police  
5 officers came into your house?

6 A At that time it was three or four of  
7 them.

8 Q Now, were they in plain clothes, or in  
9 uniform?

10 A Plain clothes.

11 Q And were they white or black?

12 A They were white.

13 Q And do you know any of their names?

14 A Not that I recall.

15 Q Thank you.

16 Now, you said that they told you to get  
17 off the phone. And did you, in fact, get off the  
18 phone?

19 A Yes.

20 Q And what happened after you got off the  
21 phone?

22 A They pulled me to the side. One of them  
23 pulled out his handcuffs.

24 Q Now, you say one of them pulled out his

1 handcuffs.

2 Could you describe that man to his  
3 Honor, Judge Holt, if you can?

4 A Describe the manner?

5 Q The man.

6 A The detective.

7 He was a white guy, kind of tall.

8 Q Now, I believe you said a gun, is that  
9 correct?

10 A No. I said guy.

11 Q Guy. I'm sorry.

12 Well, let me ask you this. Did they  
13 have their guns drawn at this time?

14 A Not that I recall.

15 Q But he pulled out his handcuffs?

16 A Yes.

17 Q And what, if anything, did you say to  
18 him?

19 A I stepped back and said I was not  
20 willing to put handcuffs on.

21 Q Now, when you say you were not willing  
22 to put the handcuffs on, did this officer say  
23 anything about you putting on handcuffs?

24 A Yes.

1 He just told me to come on again.

2 Q And when he said come on, did he put  
3 forward his handcuffs in any way?

4 A He reached for me like he was going to  
5 put them on.

6 Q And what happened after he did that?

7 A At that time I stepped back toward the  
8 living room where my mom was.

9 Q And what happened after that?

10 A A couple more police surrounded me.

11 Q Were they saying anything to you at that  
12 time?

13 A I don't use profanity. But they were  
14 using certain words like --

15 Q Were they swearing at you?

16 A Yes, they were.

17 MS. PLACEK: Instead of going into some sort  
18 of colorful detail, could we just go on that?

19 THE COURT: That is entirely up to you.

20 MS. PLACEK: Q You said they were using  
21 profanity, is that correct?

22 A Yes.

23 Q And who were they using the profanity  
24 toward?

1 A Towards me.

2 Q And when you say they surrounded you,  
3 what happened after they surrounded you?

4 A I tried to back up off of them again.

5 Q When you say tried to back up off of  
6 them again, tell his Honor, Judge Holt, what  
7 exactly you did?

8 A Well, I backed up.

9 There was one behind me. He sort of  
10 walked up toward me. And the other two were on  
11 the side, walked in toward me.

12 Q Would it be correct in saying that in  
13 fact you ~~got into a little scuffle~~ with the police  
14 at that time?

15 A Yes, it would.

16 Q And what happened after you got into  
17 this little scuffle with the police?

18 A Well, the result was I wound up with the  
19 ~~handcuffs on.~~

20 Q And what were you saying to them while  
21 they were trying to handcuff you during this  
22 scuffle?

23 A I didn't ~~want to be handcuffed.~~

24 Q Did they tell you anything?

1 A Nothing.

2 Q Did they continue swearing at you?

3 A Swearing at me, and taking me toward the  
4 door.

5 Q And did you in fact leave your home that  
6 day?

7 A Yes, I did.

8 Q Did you consent, or did you agree to  
9 leave your home with the police?

10 A No, I didn't.

11 Q You did not?

12 A I did not.

13 Q Let me ask you this:

14 When in fact you left your home, you  
15 were, of course, in the custody of the police and  
16 handcuffed, is that correct?

17 A Yes, ma'am.

18 Q Did you feel that you were free to  
19 leave?

20 A No, ma'am.

21 Q And, by the way, they took you in their  
22 car handcuffed, is that correct?

23 A Yes, ma'am.

24 Q And they took you to a police station,

1 correct?

2 A Yes.

3 Q And did you feel that you were free to  
4 leave?

5 A No, ma'am.

6 Q Also, let me ask you this:

7 At the time the police came to your  
8 house, were you violating any city, State, or  
9 municipal statute?

10 A No.

11 Q Were you violating any laws of the State  
12 of Illinois?

13 A No, I wasn't.

14 Q Thank you.

15 By the way, at the time did the police  
16 ever show you a warrant for your arrest?

17 A Nothing at all.

18 Q As a result of your arrest on August the  
19 8th, did you make certain statements to the  
20 police?

21 A Yes, I did.

22 Q And that was after, correct, your arrest  
23 on August the 8th?

24 A Yes, it was.

1 Q Specifically that was on August 9th,  
2 correct?

3 A True.

4 Q And to the best of your knowledge, those  
5 statements are -- To the best of your knowledge  
6 -- The police intended to use those statements  
7 against you in court, correct?

8 A Correct.

9 MS. PLACEK: That's all, Judge.

10 THE COURT: Cross.

11

12 CROSS EXAMINATION

13 BY

14 MR. RONKOWSKI:

15 Q What time did you get home that day?

16 A Around 5:00 in the evening.

17 Q How long had you been home before you  
18 called the police?

19 A I was home for five minutes.

20 Q And who else was home when you arrived  
21 there?

22 A My mom and my sister and my brother.

23 Q How old is your sister?

24 A 32.



1 Q And what is her first name?

2 A Devita (phonetics) Hendricks.

3 Q And your brother, how old is he?

4 A John, he was 23 at the time.

5 Q Okay. And your mother's name?

6 A Earline Hendricks.

7 Q And this is when your mother said that  
8 the police wanted to talk to you?

9 A Yes.

10 Q And you had no problems talking with the  
11 police?

12 A No, I didn't.

13 Q And upon your mother's suggestion, you  
14 called the police?

15 A Yes, I did.

16 Q And at the time you called the police,  
17 do you remember anybody being outside the  
18 premises?

19 MS. PLACEK: Objection.

20 THE COURT: Overruled.

21 MR. RONKOWSKI: Q Was there anybody  
22 outside?

23 THE WITNESS: A No, there wasn't.

24 Q How long before the police arrived in

1 response to your phone call?

2 A Say minutes after the phone call.

3 Q How many minutes, if you know?

4 A Just about five.

5 Q Okay. And when the police arrived  
6 there, did you see any other people outside your  
7 house besides the police?

8 MS. PLACEK: Objection.

9 Presuming, Judge, he first saw the  
10 police in his house.

11 MR. RONKOWSKI: I'm asking if he knows. He  
12 saw them.

13 THE COURT: I am not quite certain I  
14 understand the nature of the objection.

15 MS. PLACEK: Assuming a fact not in evidence.  
16 The defendant testified he was inside the house.  
17 He never stated he saw the police outside when  
18 they arrived.

19 MR. RONKOWSKI: Let me rephrase it.

20 THE COURT: All right. Rephrase it.

21 MR. RONKOWSKI: Q When the police arrived  
22 and you saw the police, did you see anybody  
23 outside of your house besides the police?

24 MS. PLACEK: Same objection, Judge. The

1 question is confusing.

2 THE COURT: Overruled.

3 If he understands, he may answer it.

4 THE WITNESS: A I never looked out.

5 MR. RONKOWSKI: Okay.

6 Q Well, you went down with the police to  
7 the police station?

8 A Yes, I did.

9 Q When you went to the car, did you see  
10 anybody there that wasn't the police?

11 MS. PLACEK: Objection. Beyond the scope.

12 THE COURT: Overruled.

13 MR. RONKOWSKI: Q Did you see anybody  
14 outside your house when you walked from your house  
15 to the police car that wasn't the police?

16 THE WITNESS: A Across the street from my  
17 house, yes.

18 Q How about anybody in the vicinity of  
19 your house?

20 A Not in the vicinity of my house, no.

21 Q Anybody between you and the police car?

22 A No, there was not.

23 Q How many people could you see in that  
24 vicinity when you walked to the police car?

1 MS. PLACEK: Objection.

2 He already testified not in the  
3 vicinity, Judge.

4 THE COURT: Well, can you rephrase it?

5 I don't know what vicinity means -- Or  
6 define it. One or the other.

7 MR. RONKOWSKI: Q How many people could you  
8 see as you walked from your house to the police  
9 car?

10 THE WITNESS: A Quite a few people across  
11 the street.

12 Q How many people did you see across the  
13 street?

14 A I didn't count them.

15 Q More than 20?

16 MS. PLACEK: Objection.

17 THE COURT: Overruled.

18 MR. RONKOWSKI: Q More than 20?

19 THE WITNESS: A I didn't count.

20 Q Do you recall if they were saying  
21 anything to you?

22 MS. PLACEK: Objection.

23 This goes to the relevancy of the  
24 motion, Judge.

1 THE COURT: Overruled.

2 MR. RONKOWSKI: Q Do you recall if they  
3 were saying anything to you?

4 A No. There was no one saying anything to  
5 me.

6 Q Were they saying anything to the police?

7 A Not that I recall.

8 Q Now, when you say you got a ride down to  
9 the police station, how many police were in your  
10 vehicle?

11 A I recall three.

12 Q Did you know any of their names?

13 A No, I didn't.

14 Q And were you in the front seat or back  
15 seat of the police van?

16 A I was in the back seat.

17 Q Was there someone with you?

18 A From my home?

19 Q In the back seat?

20 A Yes, there was.

21 Q Who was that?

22 A A plain clothes officer.

23 Q Was there anyone in the front seat?

24 A Yes, there was.

1 Q How many?

2 A Two officers.

3 Q How long were the police with you inside  
4 of your house?

5 A I don't know. It wasn't very long, just  
6 enough time to handcuff me.

7 Q A couple minutes?

8 A I wasn't counting at the time.

9 Q Besides calling your sister, did you  
10 make any other phone calls while you were in the  
11 house, from the time you entered until the time  
12 you left?

13 A From the time I left?

14 Q From the time you entered your house and  
15 your mother told you that the police wanted to  
16 talk to you, until the time you left with the  
17 police, did you make any other phone calls besides  
18 calling your sister?

19 A No, I didn't.

20 Q You never called Russ Ewing?

21 A No. I wasn't the one that called.

22 Q Did anybody else use the phone inside  
23 your house?

24 MS. PLACEK: Objection.

1 THE COURT: Overruled.

2 If he knows, he may answer.

3 MR. RONKOWSKI: Q At the time you entered  
4 and your mother told you the police wanted to talk  
5 to you, did you see anybody else using the phone  
6 other than at the time you called your sister?

7 A Yes, there were.

8 Q And who used the phone --

9 MS. PLACEK: Objection.

10 THE COURT: Overruled.

11 MR. RONKOWSKI: Q Who used the phone?

12 THE WITNESS: A A friend of my sister's.

13 Q And what was the name of this friend?

14 A Maria. I don't know her last name.

15 Q Anybody besides Maria and you used the  
16 phone?

17 A Not that I recall.

18 Q Do you know who Maria called? ..

19 A She called Russ Ewing.

20 Q Did you have any other conversation with  
21 the police other than what you have testified at  
22 the time you were inside your house?

23 A No, I didn't.

24 MR. RONKOWSKI: Nothing further by the State.

1 THE COURT: Redirect?

2 MS. PLACEK: Just a few.

3

4

REDIRECT EXAMINATION

5

BY

6

MS. PLACEK:

7

8

9

Q Mr. Hendricks, the Assistant State's Attorney asked you about people across the street is that correct?

10

A Yes, ma'am.

11

12

13

Q Well, as a matter of fact there was quite a struggle ensuing in your house when the police broke in, wasn't there?

14

A Yes.

15

16

17

18

Q As a matter of fact, the Assistant State's Attorney asked you about Russ Ewing. Your mother was shouting for someone to help, is that correct?

19

A Yes.

20

21

Q Because you were being dragged out of the house, correct?

22

A Yes, ma'am.

23

24

Q And to the best of your knowledge, that is why Maria called Russ Ewing, from your house?



1 A Yes, ma'am, that is why she called.

2 Q As a matter of fact, the Assistant  
3 State's Attorney asked you about being transported  
4 to the station.

5 Could you describe the vehicle, or the  
6 car that you were taken to the station in?

7 A I was transported in a detective's car.

8 Q When you say a detective's car, could  
9 you tell his Honor, Judge Holt, how you knew it  
10 was a detective's car?

11 A (No response)

12 Q Would it be -- May I withdraw and  
13 rephrase, Judge?

14 Would it be correct in saying that  
15 although they were supposed to be plain clothes  
16 cars, everyone in the neighborhood knows what they  
17 look like?

18 A Yes.

19 Q Because they were the same make?

20 A Yes.

21 Q They are the same model?

22 A Yes.

23 Q And they begin with the same letters of  
24 the license plates?

1 A License plates, yes, ma'am.

2 Q Thank you.

3 And, by the way, would it also be  
4 correct in saying that the neighborhood you were  
5 living in at that time and date was primarily a  
6 black neighborhood?

7 A Yes.

8 Q And it would be out of the ordinary to  
9 see white men in that neighborhood?

10 A Yes, it would be.

11 Q Thank you very much.

12 That is all, Judge.

13 MR. RONKOWSKI: Nothing further by the State.

14 THE COURT: Thank you, Mr. Hendricks. You may  
15 step down.

16 (Witness excused)

17 MS. PLACEK: At this time the Petitioner  
18 would rest on the motion.

19 THE COURT: Petitioner rests.

20 State?

21 MS. MALLO: Judge, we would ask that  
22 Counsel's motion be denied.

23 No argument, Judge.

24 THE COURT: Defense?